

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU 27 OF 2017
(High Court No. HBT 04 of 2016)

BETWEEN : **SOUTHERN HORIZONS S.A.**

Appellant

AND : **CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND
CUSTOMS AUTHORITY**

Respondent

Coram : **Calanchini, P**
Almeida Guneratne, JA
Jameel, JA

Counsel : **Mr. R Krishna for the Appellant**
Ms. T Rayawa for the Respondent

Date of Hearing : **20 September, 2018**

Date of Judgment : **5 October, 2018**

J U D G M E N T

Calanchini, P

[1] I agree that the appeal should be allowed and no orders as to costs.

- [2] This appeal involves the interpretation of the provisions of the Capital Gains Tax Act No. 23 of 2011 (formerly 'Decree'). The matter for determination is whether "a forfeited deposit" in consequence of a Sale-Purchase Agreement (SPA) falling through which provided for the same to be appropriated as "liquidated damages" in the event of the purchaser defaulting could be made liable for capital gains tax.

Material factual background

- [3] The Appellant (SH) as vendor entered into a SPA in respect of a land with EPIL (the purchaser). EPIL made a deposit of \$1,000,000 towards the purchase of the said land. The SPA provided for the forfeiture of the said deposit in the event of any default on the part of the purchaser. The purchaser defaulted and the said deposit was forfeited by the Vendor as 'liquidated damages'. The Respondent served a Notice of Assessment on the Appellant on the basis that the said forfeited deposit was a capital gain and was therefore liable for capital gains tax.
- [4] The Appellant objected to the said Notice of Assessment on the basis that the said forfeited deposit is not a capital gain.
- [5] The said matter for determination being first put before the Tax Tribunal (the tribunal), it referred the matter to the Tax (High) Court under Section 88(1) of the Tax Administration Decree (now 'Act') of 2009.
- [6] The Tax (High) Court having assumed jurisdiction of the matter reasoned and held as follows: Paragraphs (13) to (17) of its Judgment which I shall reproduce below:

"13. By s.2, the Decree applies to capital gains arising on the disposal of capital assets. I consider section 4(3) as the pivotal section. It reads as follows:

'If a person creates a capital asset in another person being an asset that did not previously exist, the first-mentioned person is treated as having made a disposal of the asset to the second-

mentioned person and the disposal occurs when the asset is created.'

I paraphrase it as follows: If the Applicant creates a capital asset in EPIL, which previously did not exist, then the Applicant is treated as having made a disposal of the asset to EPIL and the disposal occurs when the asset is created. I consider that the capital asset here is the right or other interest in the land and the disposal occurred when the right or interest was created by the SPA.

14. *S.4(1) states a person make a disposal of a capital asset if he part with its ownership (by the SPA) including when the asset is cancelled [s.4(1)(b)].*
15. *According to s.4(1)(a) it can be seen that by the SPA the Applicant is disposing (selling) the land to EPIL. The Applicant cancelled the sale of the Land (the asset) when it rescinded the SPA and forfeited the deposit, by its solicitors' letter dated 17 December 2014.*
16. *Even if that right or interest (asset) was cancelled by the Termination Notice, the lawmaker considers the disposal as a fait accompli under s.4(1) and (b) because the disposal is made even if the right or interest to the land is cancelled as has happened here.*
17. *I am fortified in my decision by Lawton LJ's dicta in: Macarthy's Ltd v. Smith [1979] 3 All ER at 332 that 'As the meaning of the words ... is clear, and no ambiguity, whether patent or latent, lurks within them, under our rules for the construction of Acts of Parliament the statutory intention must be found within those words.' I would pause here to state that I am not advised that a Decree is ipso facto to be construed in some other way than an Act. Therefore, I would substitute 'lawmaker's intention' for 'statutory intention'."*

(the Judgment of the (Tax) High Court dated 28th February, 2017 is at pages 1 – 3 of the Record of the High Court – RHC).

- [7] It is against that Judgment of the High Court dated 28th February, 2017 that the Appellant appealed to this Court on grounds of appeal which I shall reproduce below (at pp. 1 – 3 of the RHC):

- "A. *The judgment of the Honourable Justice Alfred delivered on 28 February 2017 ('Judgment'), wherein the Appellant's Application for Review was dismissed, Be Wholly Set Aside.*

- B. *The Respondent's objection decision dated 25 May 2016 ('Objection Decision'), partially disallowing the Appellant's objection dated 16 November 2015, be revised or set aside.*
- C. *The Capital Gains Tax ('CGT') assessment dated 16 November 2015 ('Assessment') issued by the Respondent to Appellant be set aside.*
- D. *The Respondent refund to the Appellant the sum of F\$184,321.57 (being the difference between the F\$198,334 paid to FRCA pursuant to the Assessment and the F\$14,012.43 refunded to SHSA pursuant to the Objection Decision).*
- E. *The Respondent pay the Appellant interest on the sum of F\$184,321.57 from 8 December 2015 till the date that the sum is paid to the Appellant.*
- F. *The Respondent pay the costs of the appeal.*

AND TAKE NOTICE THAT THE GROUNDS OF APPEAL ARE THAT:

- 1. *The Learned Judge erred in law and fact in his general analysis of whether the forfeiture of a deposit represented the disposal of a capital asset.*
- 2. *The Learned Judge erred in law and in fact (at paragraph 13 of the Judgment) in relying on s.4(3) of the Capital Gains Tax Decree 2011 ('CGT Decree') to hold that the Appellant had created a capital asset in Ever Prosper International (Fiji) Limited ('EPIL') by entering into a Sale and Purchase Agreement dated 19 June 2014 ('Sale Agreement') with EPIL.*
- 3. *The Learned Judge erred in law and in fact (at page 13 of the Judgment) in failing to identify the right or other interest which the learned Judge held was created by the Sale Agreement.*
- 4. *The Learned Judge erred in law and in fact in:*
 - (a) *holding (at paragraph 15 of the Judgment) that the Appellant was 'disposing of' land to EPIL under s.4(1)(a) of the CGT Decree by entering into the Sale Agreement and*
 - (b) *the cancellation of the Sale Agreement did not affect such disposal because by reason of the matters in (a) above the disposal was 'a fait accompli'.*
- 5. *The Learned Judge erred in law (at paragraph 17 of the Judgment) in holding that his decision was fortified by Lawton LJ's dicta in Macarthy's Ltd. v. Smith [1979] 3 All ER at 332*

to the effect that the words of the statute were clear and unambiguous and the statutory intention must be found within those words when:

- (a) The definition of capital asset in the CGT Decree is exhaustive.*
 - (b) A capital asset cannot be found in a sale agreement if it is not covered by the statutory definition of capital asset.*
 - (c) The learned judge did not identify the right or other interest to which he was referring in the Judgment by reference to the definition of capital asset.*
6. *The Learned Judge erred in law in failing to consider to apply himself to the authorities submitted in support of the Appellant's Application for Review."*

Determination by this Court

- [8] Having heard the oral submissions of respective counsel and having perused their written submissions as well together with the authorities contained in the said submissions, I now proceed to make my determination as follows.

The balancing factors

- [9] On the one hand it involved a matter of revenue for the State. On the other hand, the subject could not be burdened unless the Act specifically taxes the subject and in this case, a tax imposition on the basis of it being a capital gain. The said \$1,000,000 that came to the Appellant's hand which was forfeited on account of the SPA falling through was income in its hands. But whether that, was a capital gain for the imposition of a Capital Gains Tax on the Appellant was a matter that had to be deduced by a consideration of the several provisions in the Act.
- [10] At this point it must be noted that, at the time of hearing of the dispute in the High Court, it was the CGT Decree (Act) of 2011 that was in operation. In appeal against the impugned Judgment of the High Court, this Court being obliged legislatively to deal with and determine the matter as a re-hearing as contemplated by Rule 14 of the Court of Appeal Rules taken together with the fact that though the CGT Act was

repealed and replaced by the Income Tax (IT) Amending Act of 2015, the said Amending Act carrying no express provisions of a retrospective nature, the matter had to be determined in the light of the provisions of the CGT Act of 2011. There is also the other inveterate principle of law that, rights and liabilities of parties are to be determined on the law prevailing at the time the same are put in litigation.

- [11] Having said that, I shall now proceed to examine the provisions of the CGT Act of 2011 as impacting on the matter in dispute.

Examination of the CGT Act, 2011 as impacting on the matter in dispute

- [12] That Act in section 2 defined a capital asset to mean

- “(a) land, a structural improvement to land, or an interest in land or including a lease;*
- (b) a vessel of over 100 tonnage;*
- (c) yacht;*
- (d) a share, security, equity, or other financial asset;*
- (e) an intangible asset;*
- (f) an interest in a partnership or trust;*
- (g) an airplane, helicopter or other aircraft; or*
- (h) an option, right, or other interest in an asset referred to in the foregoing paragraphs, other than an asset that is trading stock for the purposes of the Income Tax Act.”*

- [13] If I were to pause at this point on that legislatively decreed definition, it is clear that, the said definition is exhaustive as to what is contemplated as being “a capital asset” for which reason I am not able to accept the Respondent’s position that, a forfeited deposit in the context of a Sale-Purchase Agreement is caught up in that definition as being “an interest in land”, in as much as, the said Section 2 had to be read with Section 6(1) of the Act which decreed thus:

“6(1) Subject to this Decree, a tax to be known as ‘Capital gains tax’ is imposed on a person who has made a capital gain, other than an exempt capital gain, on the disposal of a capital asset.”
(The underlined emphasis is mine).

- [14] That brought me to consider how a disposal of a capital asset was defined in the Act. It was defined as follows:

"4.(1) A person makes a disposal of a capital asset if the person parts with the ownership of the asset, including when the asset is –

- (a) Sold, exchanged, transferred, or distributed,; or*
- (b) Cancelled, redeemed, relinquished, destroyed, lost, expired, or surrendered.*

(2) A person disposes of a capital asset at the time the person parts with the ownership of the asset, including when a person ceases to have legal title to the asset and when the asset is sold, exchanged, transferred, distributed, cancelled, redeemed, relinquished, destroyed, lost, expired, or surrendered.

(3) If a person creates a capital asset in another person being an asset that did not previously exist, the first mentioned person is treated as having made a disposal of the asset to the second mentioned person and the disposal occurs when the asset is created.

(4) The transmission of a capital asset by succession or under a will is treated as a disposal of the asset by the deceased and the disposal occurs at the time the asset is transmitted.

(5) A disposal includes the disposal of a part of capital asset."

Was there 'a disposal?' for purposes of imposing a CG Tax?

- [15] In consequence of the proposed purchaser's default (undisputed) on the SPA, all monies previously paid (including the deposit) stood forfeited to the Appellant (the Vendor) as "liquidated damages" (vide: Clause 16.1(b) of the SPA).
- [16] In addressing my mind to that titular poser I had regard to the long title of the Act which stated the purpose and scope of it as being "To impose a Capital Gains Tax on Disposals of Capital Assets".
- [17] In that context, I agree with the Appellant's contention that, in order for any gain to have been taxed under the Act, it had to arise from the disposal of a capital asset.

Even if a forfeited deposit under a SPA is regarded as a gain, if it does not fall within the definition of a capital asset as pointed out earlier at paragraphs [12] to [13] of this Judgment, then such 'disposal' cannot be subjected to CGT.

- [18] That being the clear language of the Act, I could not find any basis to interpret the aforesaid provisions otherwise in respect of which I derived guidance from the judicial expositions made in precedents such as Inland Revenue Commissioner v. Westminster (Duke) [1936] 1 AC at 24 – 25 and The Cape Brandy Syndicate v. The Commissioner of Inland Revenue [1921] 12 TC 358 at p.366.
- [19] Furthermore, (and in that regard), I must acknowledge the useful authority which was brought to my notice by the Appellant's counsel (vide: Shernitt Gordon Mines Ltd v. FCT [1976] 10 ALR 441 at 455.
- [20] Finally, this Court was invited to re-visit the provisions of Section 4 of the Act which I have referred to in paragraph [14] above in this judgment.

The competing submissions made thereon

- [21] The Respondent concentrated on Section 4(3) which stated that:

"If a person creates a capital asset in another person being an asset that did not previously exist, the first person is treated as having made a disposal of the asset to the second mentioned person and the disposal occurs when the asset is created."

- [22] The Appellant's contention in counter was that, for section 4(3) to become operative, that first mentioned person had to part with the ownership of the asset.

- [23] The Appellant not having parted with 'ownership' which did not require an exercise in semantics to so deduce, a fact which Counsel for the Respondent appeared to concede but sought umbrage in Section 10 of the Act which had decreed thus:

"10(1) The Capital gain made by a person on the disposal of a capital asset is the consideration received on the disposal reduced by the cost of the asset at the time of the disposal."

- [24] In that regard, to a question posed by Jameel JA as to how the Respondent could reconcile the view taken by it with the threshold criterion of passing over Section 4(1) which decreed that:

"a person makes a disposal of a capital asset if a person parts with the ownership of the asset."

Counsel for the Respondent, in response fell back and relied on the High Court Judgment.

- [25] The value of a capital gain is the difference between the cost of the asset at the time of acquisition and the amount received at the time of disposal. There being no disposal of the asset in this case (because the SPA did not go through), there was no "capital gain."
- [26] Having sat to draft this judgment, conscious as I was with the balancing factors which I have referred to at paragraphs [9] to [10] in this judgment, I found the answers within the four corners of what I have referred to in paragraphs [24] and [25] above in my quest to make a determination in this appeal.
- [27] While I say that in all judicial humility, I felt fortified in reaching my conclusion through my own endeavours when I was fortunate to come across the view expressed by Lord Wilberforce in regard to the concept of 'Capital Gains Tax' wherein His Lordship had said thus:

"The capital gains tax was created to operate in the real world, not that of make-belief... it is a tax on gains (or I might have added gains less losses), it is not a tax on arithmetical differences. To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, there is not such a loss (or gain) as the legislation is dealing with, is in my opinion well and indeed essentially within the judicial function."

(vide: [1982] AC 300 at page 356) in the celebrated House of Lords decision in W.T. Ramsay v. IRC.

- [28] To sum up, the land which was the subject matter of the SPA no doubt is a capital asset. But once the SPA fell through, it remained with the Appellant. In other words there was 'no disposal' for CGT to be imposed on the Appellant.
- [29] There was no 'disposal' of an asset with the provisions of the CGT Act, particularly the charging section. This is clear from a dissection of sub-sections 2(a) to (h) and accordingly I was unable to agree with the submissions of the Respondent in regard to the 'option' under 2(h).
- [30] In regard to the Respondent's submissions in regard to the creation of the 'interest in land', in terms of 2(a) of the Capital Gains Tax Act and 'chose in action' (at page 24 of the Respondent's written submissions) for the reasons articulated earlier by me, I could not find merit.
- [31] In paragraph 13 of this judgment the learned Judge states that Section 4(3) of the Act is the pivotal section which reads as follows:-

"By s.1(2), the Decree applies to capital gains arising on the disposal of capital assets. I consider section 4(3) as the pivotal section. It reads as follows:

'If a person creates a capital asset in another person being an asset that did not previously exist, the first-mentioned person is treated as having made a disposal of the asset to the second-mentioned person and the disposal occurs when the asset is created.'

I paraphrase it as follows: If the Applicant creates a capital asset in EPIL, which previously did not exist, then the Applicant is treated as having made a disposal of the asset to EPIL and the disposal occurs when the asset is created. I consider that the capital asset here is the right or other interest in the land and the disposal occurred when the right or interest was created by the SPA."

- [32] The learned Judge says in paragraph 16 that even if that right or interest was cancelled by the Termination Notice that amounts to a 'disposal' under Section 4(1) and (b) "because the disposal is made even if the right or interest in the land is cancelled as it has happened here."

- [33] However, the pivotal requirement for CGT to get engaged is the actual disposal and as specified in Section 4(2), the parting with the ownership of the asset. In this case, the asset being land, unless title to the land changed hands from the Appellant to EPIL, for the purposes of Section 4(2), the conditions necessary for the imposition of the CGT could not have arisen.
- [34] This issue can be approached in a manner that indicates that the appellant has not disposed of any interest that had previously not existed. When the parties signed the agreement and when at the same time the purchaser paid \$1m as the deposit, the vendor disposed of his equitable interest in the land which passed to the purchaser. When the purchaser defaulted, the agreement fell through. The purchaser lost his equitable interest in the land which passed back to the vendor. The vendor has not disposed of any interest in the land; he has regained his equitable interest. He has retained the deposit as liquidated damages for the non-compliance of the contract by the purchaser. There was no disposal of any interest in the land and the vendor did not receive a capital gain by way of disposal of a capital asset.
- [34] As noted earlier, the judgment of the High Court (at para 13) dealt with section 4(3) as being the 'pivotal section'.
- [35] No doubt, that was the pivotal section which the learned Judge had regard to when he responded positively to the Respondent's submission based on the 'creation of an asset'.
- [36] But, in view of the interpretation I have placed on Sections 4(1) to 4(3) of the CGT Act, that submission was not entitled to succeed.

Final determination of the Appeal and Conclusion

- [37] For the aforesaid reasons I hold that, the judgment of the High (Tax) Court does not bear scrutiny for which reason I set it aside and allow the appeal.

[38] Before parting with this Judgment I place on record the valuable assistance given to Court by Counsel by way of their oral, written submissions and the extensive authorities tendered.


Jameel, JA

[39] I have read the draft judgment of Guneratne, JA and agree with his conclusion and proposed orders.

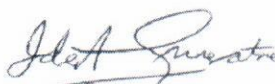
Orders of Court

1. *The judgment of the High Court dated 28th February, 2017 is set aside and the appeal is allowed.*
2. *Consequences of Order 1 to take its course.*
3. *No order is made for costs.*

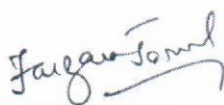




Hon. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL



Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL



Hon. Justice F. Jameel
JUSTICE OF APPEAL